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NOS. 87-1622, 87-1697, and 87-1711

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

PHILIP BRENDALE,
Petitioner,
v.
CONFEDERATED TRIBES AND BANDS OF
THE YAKIMA INDIAN NATION, ET AL.,
Respondents.

STANLEY WILKINSON,
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ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF OF THE STATE OF SOUTH DAKOTA AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

86pp

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QUESTIONS PRESENTED

I

WHETHER, CONSISTENT WITH THE 1834 STATUTE DEFINING INDIAN COUNTRY TO EXCLUDE NON-INDIAN LANDS, THE GENERAL ALLOTMENT ACT, THE INDIAN REORGANIZATION ACT, AND INDIAN LAW AND TREATY, INDIAN TRIBES HAVE BEEN HISTORICALLY REGARDED AS HAVING GENERAL CIVIL JURISDICTION OVER NON-INDIANS AND THEIR LANDS ON INDIAN RESERVATIONS.

II

WHETHER THE UNITED STATES CONSTITUTION AS INTERPRETED IN BOOS V. BERRY AND OTHER CASES, PERMITS CONGRESS, WHEN ACTING ALONE OR WITH AN INDIAN TRIBE, TO DEPRIVE NON-INDIAN CITIZENS OF THEIR RIGHT TO GOVERN THEMSELVES.

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STATEMENT OF INTEREST

South Dakota comes before this Court seeking to preserve the right of its non-Indian citizens on fee lands to continue to govern themselves.

Indian tribes in South Dakota have recently and frenetically attempted to effect a revolution in the governance of non-Indians. For example, the Indian tribe in Sisseton, South Dakota, has recently claimed the right to regulate non-Indian fishing on all non-navigable lakes in the area, even though some of the lakes are surrounded 100 percent by non-Indians and even though the Sisseton Reservation has been disestablished. See DeCoteau v. District County Court, 420 U.S. 425 (1975).

The Indian tribe of the Pine Ridge Reservation has attempted to coerce the State of South Dakota into recognition of tribal

license plates even outside the borders of the reservation.

The Indian tribe at the Cheyenne River Sioux Tribe has attempted to force the community of Isabel, a town of over 80 percent non-Indians, into buying a tribal liquor license, in direct defiance of the federal liquor law. See 18 U.S.C. § 1165. The tribe has also retaliated for the failure of the reservation communities to buy such licenses by imposing a tribal boycott of such towns in which such businesses are located.

Several tribes, including the Oglala Sioux Tribe of Pine Ridge, the Rosebud Sioux Tribe, the Cheyenne River Sioux Tribe and the Standing Rock Sioux Tribe have enacted Tribal Employment Rights Ordinances. See, e.g., excerpts from Oglala Sioux Tribe Ordinance No. 84-08, set out in the Appendix. These ordinances purport to impose a requirement that a contractor or employer working in the

reservation, including one on fee lands, hire any Indian over any non-Indian. The ordinances most certainly violate the equal protection clause. See Local 28 of the Sheet Metal Workers International Assn. v. EEOC, 478 U.S. _____, 88 L.Ed.2d 47 (1986); Wygant v. Jackson Board of Education, 476 U.S. 267 (1986). The ordinances also contain provisions which may violate search and seizure law, set up elaborate administrative machinery for the enforcement of the ordinances, and then impose a tax on the mostly non-Indian businesses to pay for the ordinances.

Non-Indians were not, of course, allowed to vote for or against the enactment of any of the ordinances or policies established by the tribes as mentioned above. Nor can they sit on a tribal jury to determine the violation of such an ordinance.

If non-Indians are to be abruptly, in 1988, subjected to tribal governance, they have the right, as a matter of at least natural law, if not federal constitutional law, to a government which is of a high character and caliber. Moreover, because the non-Indian citizenry has no opportunity to participate in policy making, the non-Indian citizen should at least be able to expect a highly competent and independent judiciary.

Yet the experience in South Dakota is plainly to the contrary. The recent hearings before the United States Commission on Civil Rights yield graphic examples. See Hearings Before the United States Commission on Civil Rights, Rapid City, South Dakota, 1986. The Hearings, taken under oath, were teaming with evidence of lawlessness. Four tribal judges reported that they were suspended or fired as a direct result of decisions made by them. These include Rosebud Sioux Tribal Judge

Trudell Guerue (suspended), Hearings, p. 121; Cheyenne River Sioux Tribe Judge Nancy Condon (suspended), id. at p. 369, Judge Gilbert LaBeau (fired), id. 139, 149; and Judge Woods (fired), id. at 393. The chairman of the Cheyenne River Sioux Tribe testified under oath that tribal law has been "amended by the tribal council that no reason is needed now to remove a judge. All it takes is just an action of the tribal council to remove a judge." Id. at 383.

Perhaps even more ominous was the readiness of the tribal councils to overrule the decisions of the tribal courts. The hearings reveal this is a regular occurrence. See Hearings, p. 130, see also Hearings, pp. 37, 75. But see, Hearings, p. 74. The tribal councils are said to be "very receptive" to requests to achieve a remedy which a party had failed to achieve in court. Hearings, p.38. The ability of tribal

councils to take such actions would not be so disturbing, of course, in a situation in which the non-Indians were able to vote for members of the tribal council. If, however, powers of tribal governments are unleashed to dictate the affairs of non-Indians on fee land on the reservation, it can be almost certainly predicted that non-Indians who manage to achieve justice in the tribal courts will be faced with further obstacles to the achievement of that justice in the tribal councils. Since they have no representation in the tribal councils[1] and since the rule of law is not even theoretically applicable therein, the

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[1]Indeed, the Bylaws of the Cheyenne River Sioux Tribe extend the right to attend the tribal council meetings only to "members of the Tribe." Bylaws of the Cheyenne River Sioux Tribe of South Dakota, Art. IV, § 6.

non-Indians can be said to have been deprived of their most basic rights.

It is also important to stress that the tribal councils profess to have the ability to negate not only ordinary law but also federal law, including the Indian Civil Rights Act itself. On many reservations, the Indian Civil Rights Act is a dead letter. On the Cheyenne River Sioux Tribe Reservation, the tribal judge regularly refers any Indian Civil Rights Act action to the tribal council to determine whether it will waive sovereign immunity. Hearings, p. 356, 379. In no case since 1979 has the tribal council waived such immunity. Hearings, p. 377. A former judge at Rosebud has said of the Indian Civil Rights Act, "The Indian Civil Rights Act--this may not be nice to say, but you get more use out of a roll of toilet paper. That is nothing. It means nothing." Hearings, p. 125-126.

Professor Pomershein, a pro-tribal government advocate, testified on the effect that the assertion of sovereign immunity had on the Indian Civil Rights Act in tribal court: "I think that for all practical purpose that puts an end to it" with the exception of the habeas corpus relief. Hearings, p. 17.

A glance through the hearing record reveals other serious generic difficulties--300 people arrested in a four to five month period who never came to court, Hearings, p. 124, tribal judges who pre-sign stacks of search warrants and arrest warrants, Hearings, pp. 98-99; a prosecutor fired eight times by the tribal council, Hearings, p. 345; and the common practice of litigants to obtain a new judge and a new order when they do not like the old judge and the old order, Hearings, pp. 36, 63. Especially telling with regard to appellate

court judgments was the comment of Krista Clark, an attorney with Dakota Plains Legal Services:

> I have had experience with the appellate court issuing decisions directly to lower court judges, and the lower court judges, probably because they didn't understand what they were supposed to do, completely ignoring what the appellate court said for them to do, and repeating the same exact same errors.
>
> I don't think that precedent means anything.

Hearings, p. 72.

The situation in tribal government and tribal courts in South Dakota is serious. Hearings elsewhere, we are informed, reveal the same problems in other places. Letter dated January 26, 1988, from John R. Bolton, Assistant Attorney General, U.S. Department of Justice, to Senator Daniel K. Inouye, included as Appendix B to Brief of States of Arizona, et al. in Support of Petitions for a Writ of Certiorari to the United States Court

of Appeals for the Ninth Circuit in this litigation. Nor are these new problems, as revealed by the hearings on the Civil Rights Act in the late 60's. See Hearings Before the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary, 87th Cong., 1st Sess., 89th Cong., 1st Sess. (1961, 1965). See also Brakel, American Indian Tribal Courts, The Costs of Separate Justice (American Bar Foundation 1978). The work by Brakel, a research attorney for the American Bar Foundation, is especially illuminating in that it, when read with the transcript of the recent hearings, reveals the persistence, and indeed the worsening of problems within the tribal judicial systems. See also, Santa Clara Pueblo v. Martinez, 436 U.S. 49, 82 (1978) (White, J., dissenting).

The South Dakota Constitution adopted in 1889, pronounces the people of South Dakota grateful for their "civil and religious

liberties," and sets forth the purposes of the Constitution to form a "more perfect and independent government, establish justice, [and] ensure tranquility . . . ." Preamble, S.D. Const. Preservation of the right of non-Indians on fee lands to continue to rule themselves will serve that end. Subjection of non-Indians to the governance of the tribes will run counter to that end. For these reasons the State of South Dakota requests this Court to overturn the decisions of the Court of Appeals.[2]

SUMMARY OF ARGUMENT

South Dakota's argument is in two parts. First, South Dakota argues that the commonly

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[2] See Reviser's Note, 1948 Act, 18 U.S.C. § 1153 for a brief overview of some of the complex jurisdictional history of the state of South Dakota.

shared assumption of the executive, legislative, and judicial branches was that the tribes were not to have jurisdiction over non-Indians and especially non-Indians on fee lands. Indeed, the historical concept of "Indian country" did not, in general, even include non-Indian lands on reservations. See 4 Stat. 729, Act of June 30, 1834; Bates v. Clark, 95 U.S. 204, 208 (1877). It was not until the passage of 18 U.S.C § 1151 in 1948 that Congress declared fee lands to be "Indian country." See, Solem v. Bartlett, 465 U.S. 463, 468 (1984). Moreover, because the lands at issue were apparently conveyed under the authority of the Allotment Acts, the rule of Montana v. United States, 450 U.S. 544, 559, n.9 (1981) precluding tribal jurisdiction over non-Indians who took the allotments is applicable.

South Dakota next submits that a change (or affirmation) in federal policy to permit

the tribes to have civil jurisdiction over non-Indians, and especially those on fee lands, is constitutionally impermissible. The reason is a basic one. Non-Indians are excluded from participation in tribal government. To impose tribal jurisdiction on a non-Indian deprives him of his most basic rights under the Constitution. Since Congress cannot, even under the treaty power, deprive any of its citizens of their rights under the Constitution, see Boos v. Barry, ____ v. ____, 99 L.Ed.2d 333, 346 (1988), it cannot deprive the non-Indians on the plains of South Dakota of their right to representative government any more than it could deprive blacks in the city of Selma, Alabama of their right to representative government.

ARGUMENT

I

INDIAN TRIBES HAVE NEVER BEEN RECOGNIZED TO HAVE GENERAL CIVIL JURISDICTION OVER NON-INDIANS, AT LEAST ON FEE LANDS.

In determining whether Indians are now, or have been at any time, assumed to have civil jurisdiction over non-Indians, it is useful to examine the periods before, during and after the General Allotment Act or Dawes Act. Each of these periods, in the opinion of the State, yields the conclusion that the common understanding was that tribal civil jurisdiction did not extend to non-Indians, especially those non-Indians beyond the limits of the lands owned by the tribe or held in trust by the tribe. The common understanding or presumption of the executive, judicial and legislative branch is, of course, significant. See Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 206 (1978).

A. Pre-General Allotment Act Era.

From the very first, this Court has indicated that the tribal governments retained a right to govern only tribal members and that this right extended only to tribally owned and occupied lands. In Fletcher v. Peck, 6 Cranch 87, 147, 3 L.Ed. 162 (1810), Justice Johnson stated:

> All of the restrictions upon the right of soil and the Indians, amount only to an exclusion of all competitors from their markets; and a limitation upon their sovereignty amounts to the right of governing every person within their limits except themselves. (Emphasis added.)

Justice Marshall pronounces the Indians to be domestic dependent nations in The Cherokee Nation v. Georgia, 5 Pet. 1, 8 L.Ed. 25 (1831). Critically, he goes on to say:

> They occupy a territory to which we assert a title independent of their will, which must take effect in point of possession when their right of possession ceases. Meanwhile they are in a state of pupilage. Their relation to the

> United States resembles that of a ward to his guardian.

8 L.Ed. at 31. The Indians are wards of the United States; when they give up their property the United States gains title. What occurs at that moment? The Plaintiffs in the case now before this Court argue that at this moment the tribe becomes the ruler of non-Indians on the property which they have ceded. Clearly the opposite is implied. Congress could not have intended the ward to become the guardian when his right to particular territory ceased. See also, United States v. Payne, 264 U.S. 446, 448 (1924).

In Worcester v. Georgia, 6 Pet. 515, 551-552, 554, 8 L.Ed. 483 (1882) Chief Justice Marshall examined the tribal acknowledgement of dependence upon the United States as embodied in treaty and stated:

> The Indian nations were, from their situation, necessarily dependent on

> [the United States] . . . for their protection from lawless and injurious intrusions into their country.

Id. at 555, 8 L.Ed. 483. According to the Oliphant Court, 435 U.S. at 207, this acknowledgement implied "in all probability" that the tribe recognized that the United States would arrest and try non-Indian intruders who came into their reservation.

The dependence of the tribe on the United States for criminal jurisdiction purposes was thus made apparent by the treaty itself.

A similar statement of dependence, a statement which clearly is a dependence as to wrongs done to property, is included in the 1868 Treaty with the Sioux. This treaty is of special interest to the State of South Dakota since it involves South Dakota tribes, among others. The Treaty with the Sioux at Art. I states:

> If bad men among the whites, or among other people subject to the authority of the United States, shall commit any wrong upon the person or property of the Indians, the United States will, upon proof made to the agent and forwarded to the Commissioner of Indian Affairs at Washington City, proceed at once to cause the offender to be arrested and punished according to the laws of the United States, and also reimburse the injured person for the loss sustained.

15 Stat. 635, Act of April 29, 1868 (emphasis added).

Thus the section requires the Indians to turn over a white person who has committed a wrong, or tort, against the "person or property of the Indians" to the federal authorities who will "reimburse the injured person for the loss sustained."

This is the essence of a civil recovery. The Indians were not allowed civil jurisdiction over the non-Indians; they were to turn the person who injured an Indian or damaged property over to the federal

authorities who would then take care of the matter. Thus the situation in South Dakota goes further than in Oliphant in that the precise actions of the United States are described in the treaty itself. Tribes subject to the 1868 Treaty, therefore, cannot been recognized as having general civil jurisdiction over non-Indians through treaty--the contrary is clearly the case.

In determining the reach of tribal jurisdiction, it is also important to note the development of statutory law. In 1834 the Congress enacted "An Act to Regulate Trade and Intercourse with Indian Tribes and to Preserve Peace on the Frontiers." The Act defines "Indian country" as follows:

> That all that part of the United States west of the Mississippi, and not within the states of Missouri and Louisiana, or the territory of Arkansas, and, also, that part of the United States east of the Mississippi river, and not within any state to which the Indian title has not been extinguished, for the

> purposes of this act, be taken and deemed to be the Indian country.

4 Stat. 729, Act of June 30, 1834. The Act thus recognizes as Indian country only that land to which the Indian title had not been extinguished. Where Indian title was extinguished, there was no Indian country.

Moreover, this Act was found, in 1877, to be applicable to all lands, whether east or west of the Mississippi, clearing up any potential ambiguity in the statute.

> The simple criterion is, that, as to all the lands thus described, it was Indian country whenever the Indian title had not been extinguished, and it continued to be Indian country so long as the Indians had title to it, and no longer. As soon as they parted with the title, it ceased to be Indian country, without any further Act of Congress, unless by the Treaty by which the Indians parted with their title, or by some Act of Congress, a different rule was made applicable to the case.

Bates v. Clark, 95 U.S. 204, 208 (1877) (emphasis added). Thus, leading into the

period of the General Allotment Act, both common law and the statutory law indicated that in general a tribe's jurisdiction ceased where its land ownership ceased.

B. The General Allotment Act Era.

The reason this case comes before this Court is that non-Indians reside on the reservation. The reason non-Indians reside on the reservation is that Congress enacted the General Allotment Act establishing the federal policy to invite non-Indians to the reservations. The issue, therefore, is whether Congress intended the non-Indians who took advantage of the General Allotment Act to be subject to tribal jurisdiction.

This Court definitively identified the purpose and effect of the General Allotment Act in Montana v. United States, 450 U.S. 544 (1981). The opinion points out that the "policy of the Acts was the eventual assimilation of the Indian population" and

the elimination of "tribal relations." 450 U.S. at 559, n.9. Consistent with the "Act to Regulate Trade and Intercourse with Indian Tribes" passed in 1834, see Bates v. Clark, supra, Congress intended in passing the General Allotment Act that diminishment of territory of the tribe would necessarily preclude the exercise of jurisdiction by the tribe as to that territory and to the persons taking allotments. According to the Court:

> Indeed, throughout the congressional debates, allotment of Indian lands was consistently equated with the diminishment of tribal affairs and jurisdiction [citing several senatorial speeches].

450 U.S. at 559, n.9. The Court went on to say:

> It defies common sense to suppose that Congress would intend that non-Indians purchasing allotted lands would become subject to tribal jurisdiction when an avowed purpose of the allotment policy was the ultimate destruction of tribal government.

Id.

See also, DeCoteau v. Dist. County Court, 420 U.S. 425, 432 (1975); Mattz v. Arnett, 412 U.S. 481, 496 (1973); Nichols v. Rysavy, 809 F.2d 1317 (8th Cir. 1987), cert. denied _____ U.S. _____, (1987) (construing several allotment statutes including 25 U.S.C. § 331, 345, 352(a) and (b)). See also, Otis, The Dawes Act and the Allotment of Indian Lands (F. Pucha Ed.).

In line with this view are the congressional enactments establishing a United States court "in Indian territory." The first act, in 1889, provided general jurisdiction and civil actions would lie in United States court. The important proviso is

> Nothing herein contained shall be construed to give the [United States] court jurisdiction over controversies between persons of Indian blood only. . . .

25 Stat. 783, § 6, Act of March 11, 1889. Thus, the tribal court by implication had no jurisdiction to hear actions involving non-Indians. It could hear "controversies between persons of Indian blood only."

Similarly, the following year, the Act was amended but the jurisdiction of the tribes was again identified. Section 31 states that the

> Judicial tribunal of the Indian nations shall retain exclusive jurisdiction in all civil and criminal cases arising in Indian country in which members of the nation by nativity or adoption shall be the only parties.

Act of May 2, 1890, § 31, 26 Stat. 81, 93. See Alberty v. United States, 162 U.S. 499, 502-503 (1896), pointing out that the Congress in this Act limited the jurisdiction of the tribal court beyond that of the 1868 Treaty with the Cherokee.

In other words, the Congress in these Acts refused to recognize any civil

jurisdiction in Indian country with regard to non-Indians, even non-Indians on Indian lands. Such a Congress would not, it seems reasonable to say, vest civil jurisdiction over non-Indians in a place not thought to be Indian country. Thus, the Congresses which enacted the Allotment Acts could not have intended that the tribes have jurisdiction in civil matters over non-Indians on the newly allotted lands. Such is completely inconsistent with the interpretation of the General Allotment Act in Montana v. United States and of the contemporaneous legislation cited above.

C. The Post General Allotment Act Era.

One of the principal landmarks of the post General Allotment Act era is the Indian Reorganization Act of 1934. 48 Stat. 984. The amicus brief on the merits submitted by the State of Washington thoroughly demolishes the myth that the Indian Reorganization Act

recognized tribal jurisdiction over non-Indians. Exactly the contrary is true, as Washington so ably establishes. A proper reading of the IRA strongly supports the thesis that the tribes were not intended to have jurisdiction over non-Indians.

Moreover, the post General Allotment Act era was marked by a continued recognition of the nexus between ownership of lands by Indians and reservation status. In Solem v. Bartlett, 465 U.S. 463, 468 (1984) the Court explained:

> The notion that reservation status of Indian lands might not be coextensive with tribal ownership was unfamiliar at the turn of the century. Indian lands were judicially defined to include only those lands in which the Indians held some form of property interest: trust lands, individual allotments, and to a more limited degree, open lands that had not yet been claimed by non-Indians. [Citations omitted.] Only in 1948 did Congress uncouple reservation status from Indian ownership, and statutorily defined Indian country to include lands held in fee by

non-Indians within reservation boundaries.

Thus, at least until 1948, fee lands within the boundaries of a reservation were not regarded as "Indian land." See also, Cohen, Handbook on Federal Indian Law, 359 (1942). The reservation was not regarded to be coextensive with its external boundaries. For these reasons alone, the non-Indian on fee land remains today beyond the jurisdiction of the tribe. This is so because the United States granted the property in question to non-Indians before 1948,[3] and must have intended, consistent with the line of cases from Bates through Solem v. Bartlett and consistent with the policy of the General Allotment Act, that the

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[3]The Indian Reorganization Act of 1934 halted further disposition of tribal territory.

non-Indians would not then be in Indian country and hence certainly not subject to Indian jurisdiction.

A critical distinction must be made at this juncture. It is now established that fee lands on the reservation are, by virtue of the Act of 1948, "Indian country." See Solem v. Bartlett, 465 U.S. at 468.

Nonetheless, the intention of the Congress with regard to civil jurisdiction over non-Indians on fee patented lands must be separately considered. Seymour v. Superintendent, 368 U.S. 351, 358 (1962) points out that the reason for passage of 18 U.S.C. § 1151 in 1948 was the avoidance of checkerboard jurisdiction in criminal matters. See also, Reviser's Note, 1948 Act. No reasonable argument can be made that the 1948 Act extended tribal civil jurisdiction over non-Indians when the Act was, in fact, intended to set the parameters of federal

criminal jurisdiction over Indians. While the technical legal status of fee lands may be reservation by virtue of the 1948 Act, and while the tribes may therefore have jurisdiction over their own members on those particular lands by virtue of this Act, cf., United States v. Celestine, 215 U.S. 278 (1909) the intent of Congress with regard to non-Indians on fee lands within the reservation remained that they were beyond tribal civil jurisdiction, consistent with the Court's decision in Montana v. United States.

Recent Cases

The inability of a tribe to control any affairs but their own, see Fletcher v. Peck, 6 Cranch 87, 147, 3 L.Ed. 162, 181 (1809); In Re Crow Dog, 109 U.S. 556, 569 (1883) and the statutory and common law limitations of tribal authority to their own land and members set the stage for the most important

recent Indian cases. In Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978), this Court found that the Indian tribes were prohibited from exercising powers which were inconsistent with their status. The Court said:

> from the formation of the Union and the adoption of the Bill of Rights, the United States has manifested an equally great solicitude that its citizens be protected by the United States by unwarranted intrusions on their personal liberty. The power of the United States to try and criminally punish is an important manifestation of the power to restrict personal liberty.

435 U.S. at 210. The tribes now, in effect, contend that a non-Indian may be deprived of rights in his property by tribal courts and deprived of his right to govern himself by tribal governments even though these rights, enforceable in civil court, are of constitutional dimension. Zoning, of course, the issue in this very case, can effect a constitutional taking, see First English

Evangelical Lutheran Church of Glendale v. County of Los Angeles, California, 482 U.S. ____, 96 L.Ed.2d 250 (1987). Likewise, the government may act unconstitutionally to deprive a debtor of his property. Fuentes v. Shevin, 407 U.S. 67 (1972). The very right to one-person one-vote is enforceable by civil action. Baker v. Carr, 369 U.S. 186 (1962). Certainly invasion of these rights constitutes unwarranted intrusion into personal liberty condemned in Oliphant.

The Oliphant Court also pointed to the "commonly shared presumption of Congress, the executive branch, and the lower federal courts that the tribal courts do not have the power to try non-Indians. . . ." 435 U.S. at 406.

It should be noted, again, that the commonly shared presumption was that Indian tribes did not have jurisdiction outside of their own territory and that their territory

ended where their property ended. Thus the commonly shared presumption was that a non-Indian on fee land would not be subject to the jurisdiction of the tribal courts if, for no other reason, than that those fee lands were outside of what was regarded as Indian country or the Indian reservation.

In United States v. Wheeler, 435 U.S. 313, 323, the Court again referred to the fact that tribal jurisdiction was limited "by implication as a necessary result of their dependent status." 435 U.S. at 323. Of note is the specific recognition of what the Court believed the inherent tribal sovereignty of the tribe to be. The Court referred to the right to determine the "membership" in the tribe, "to regulate domestic relations among tribe members" and also "to prescribe rules for the inheritance of property." 435 U.S. at 322, n.18. While this list may not have been intended to be exclusive, the citation

of the six cases in the footnote, and the identification of specific sorts of powers, leads quite quickly to the conclusion that the Court did not assume that the tribe had broad powers over non-Indians. When the Court identified the constituents of inherent sovereignty in Wheeler, it certainly did not, by any stretch of the imagination, imply that the tribes had a broad authority over non-Indians. Indeed, the opposite is very strongly implied.

Montana v. United States, 450 U.S. 544 (1981) builds upon Oliphant and Wheeler.

Montana's holding is based on two related principles. First, Montana finds that Congress did not intend non-Indians who took property under the General Allotment Act to be subject to tribal jurisdiction. 450 U.S. at 559, n.9. As discussed above, the Court found that such would defy "common sense."

Second, the Court re-echoed the words of Justice Johnson in Fletcher v. Peck to the effect that the Indians had lost any "right of governing every person within their limits except themselves." Fletcher v. Peck, 6 Cranch 87, 147, 3 L.Ed. 162, quoted in Montana v. United States, 450 U.S. at 565. According to the Montana Court, 450 U.S. at 464, the principles on which Oliphant, supra relied

> support the general proposition that the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe. (Emphasis added.)

The Court went on to apply the two principles--i.e. relating to the General Allotment Act and to inherent sovereignty to find the nonexistence of tribal jurisdiction over non-Indian hunting and fishing.

The general rule of Montana is plain--tribes have no jurisdiction over non-Indians.

The court then, in dictum, listed several exceptions to the general rule. These exceptions, it might be noted, were not analyzed for consistency with Oliphant, Wheeler, or indeed, with the holding in Montana itself.

Nonetheless, the cases cited in Montana as exceptions to the general rule may be helpful to determine the quality and nature of jurisdiction included in the exceptions. The Court first referred to regulations of those who entered "consensual relationships" with the tribe or its members. Williams v. Lee, 358 U.S. 217 (1959), merely holds that the state cannot exercise jurisdiction over an Indian who makes a contract in Indian country. Washington v. Confederated Tribes of the Colville Indian Reservation, 447 U.S. 134, 152-154 (1980), in the pages cited, says that a tribe can tax a non-Indian purchasing

cigarettes on trust land within a reservation.

A tax case decided by the Eighth Circuit Court of Appeals, Buster v. Wright, 135 F. 947 (8th Cir. 1905) is also cited. Buster finds that a non-Indian may be subjected to a license requirement of the Creek tribe even on privately owned land. The Eighth Circuit found that the Creek territory was not subject to the rule set out in Bates v. Clark, supra. Buster v. Wright is also apparently unique insofar as the acts of the tribal council were approved by the President of the United States. Moreover, it seems unique in that the allotments to the non-Indians were apparently not under the Allotment Act, see Montana v. U.S., but pursuant to deeds signed by the President of the tribe and the Secretary of the Interior.

The State thus suggests that the decision of the circuit court in Buster

should be given little weight as it refers to a clearly unique situation on several critical points.

In sum, in the "consensual" exceptions to the general rule set as in Montana, the Court indicated that the state could not force an Indian into state court with regard to a contract which was undertaken in Indian country, and that the tribe could tax non-Indians purchasing products on trust land within the reservation. The effect of Buster v. Wright remains problematic because of the unique factual and legal situation therein, especially when the language of the circuit court opinion is tested against the explicit language with regard to the allotment acts in Montana, and Bates v. Clark.

The second part of the Montana exception is as follows.

> A tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on

> fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe.

450 U.S. at 566. It is not too much to say that this Montana exception has inspired frenzied exertions on the part of the tribes to impress their jurisdiction upon non-Indians. Yet when the case authorities explaining and analyzing the actual parameters of the tribal authority are analyzed, the tribal authority is seen not to correspond with the tribal claims. Four cases are cited by the Court. Fisher v. Dist. County Court, 424 U.S. 382, 383 (1976) stands for the proposition that state courts do not have jurisdiction over an adoption proceeding "in which all parties are members of the tribe and residents of the northern Cheyenne Reservation."

Williams v. Lee, supra, is cited for the familiar rule that state jurisdiction is preempted when the state action infringes on the right of reservation residents to make their own laws and be ruled by them. In Williams, of course, the state of Arizona was forbidden to force an Indian into state court with regard to certain goods sold on the reservation.

Thus, the first two cases cited under the "political integrity" exception stand only for the proposition that state courts do not have jurisdiction over certain Indians with regard to acts which take place on the reservation.

Advocates of expansive tribal sovereignty who rely upon these two cases to support their interpretation of the Montana language are simply not justified. Fisher did not involve any non-Indian parties and therefore cannot stand for such a

proposition. Williams involved an Indian defendant and excused the Indian defendant from participating in the state court proceeding. Williams does not force a non-Indian defendant (or plaintiff for that matter) into tribal courts.

Moreover, the Court also cited as having particular relevance two cases decided around the turn of the century. In Montana Catholic Missions v. Missoula County, 200 U.S. 118 (1906) a religious order argued that certain cattle had been dedicated to the benefit of the Indians and therefore were exempt from state taxation. The cattle were alleged to "graze upon lands included within the said reservation." 200 U.S. at 122. The religious order contended that the cattle could not be taxed by the state. The Supreme Court found that the religious orders unreservedly owned the cattle and that their claim to exemption from state taxation was

without "plausibility." Thomas v. Gay, 169 U.S. 264 (1898), also rejects a challenge to state authority on the reservation. Thomas held that a state can tax cattle owned by a non-Indian even though the cattle are grazed on the reservation on land leased from the Indians. The tax was "too remote and indirect to be deemed a tax upon the lands or privileges of the Indians." 169 U.S. at 273.

Thus two of the cases cited in the "political integrity" exception in Montana recognize immunity of Indian defendants from the jurisdiction of state courts. Two approve the jurisdiction of state courts on reservation land in taxation matters.

It is also important to emphasize that none of the cases within the "political integrity" exception subject any non-Indian to any civil jurisdiction of a tribal court. The attempt to make of these cases what they are not must be rejected. Moreover, it is

suggested that this is why, in the "political integrity" exception, the Court said only that the tribe "may also retain inherent power" over these matters. The use of the term "may" indicates an appreciation by the Court of the lack of definitive common law or statutory authority on the subject and a desire to await further elucidation on the issue before allowing tribal jurisdiction over non-Indians who were unable to participate in the tribal government.

In sum, the Oliphant, Wheeler, Montana triad indicate that, as a general rule, the tribes have no jurisdiction over non-Indians on fee lands. Such is consistent with the early cases of this Court and is consistent with the statutory and common law rule under which the purchaser of allotted lands acted. The tribe simply had no jurisdiction where it had no territory. Since fee lands were not

within the tribal territory, the tribes had no jurisdiction.

The tribal claim will no doubt be that two recent cases of the Court change the law. The first of these is National Farmers Union Insurance Company v. Crow Tribe, 471 U.S. 845 (1985). In this case, however, the Supreme Court held only that the tribal court had the first chance to determine whether it had civil jurisdiction over non-Indians. The Court's "may" language in the Montana case with regard to that jurisdiction left that an open question. While the state may not agree that it is a wise use of judicial resources to remand the matter to the initial determination of the tribal court, it certainly cannot be said that National Farmers Union overrules Montana.

The second case often cited by the tribes is Iowa Mutual Insurance Company v.

LaPlante, 480 U.S. _____, 94 L.Ed.2d 10 (1987). In LaPlante, the court said:

> Tribal authority over the activities of non-Indians on reservation lands is an important part of tribal sovereignty. See Montana v. United States, 450 U.S. 544, 565-566, 67 L.Ed.2d 493, 101 S.Ct. 1245 (1981); Washington v. Confederated Tribes of Colville Indian Reservation, 447 U.S. 134, 152-153, 65 L.Ed.2d 10, 100 S.Ct. 2069 (1980); Fisher v. District Court, 424 U.S., at 387-389, 47 L.Ed.2d 106, 96 S.Ct. 943. Civil jurisdiction over such activities presumptively lies in the tribal courts unless affirmatively limited by a specific treaty provision or federal statute.

94 L.Ed.2d at 21.

The tribes have read this language to mean that civil jurisdiction over all activities of non-Indians is presumptively in the tribe. This is, of course, a serious misreading of that language, for it completely ignores the citation by the court of the Montana, Confederated Tribes, and Fisher cases. Citation of these opinions

indicates only that jurisdiction as to the activities cited in the three opinions, would normally lie in the tribal court. Thus, to determine the meaning of the LaPlante citation, it is necessary to return again to Montana v. United States, 450 U.S. at 565-566, a task already completed here. Likewise, inspection of Washington v. Confederated Tribes of the Colville Indian Reservation, 447 U.S. at 152-153, indicates only that a tribe can collect a tax for sales made on trust lands to non-Indians. Fisher v. District Court, 424 U.S. at 387-389, as noted, indicates only that the state court does not have jurisdiction over an adoption proceeding in which all of the parties are members and residents of the particular reservation. LaPlante merely reiterates previous holdings of the court; the attempt to stretch LaPlante beyond plausibility is unwarranted.

The contrary conclusion, that is, that all non-Indian activity on reservation lands presumptively lies within tribal jurisdiction is simply unwarranted and sets up an unworkable dichotomy between criminal and civil matters.

It is apparent that one's rights might be severely affected by a civil proceeding. For example, a rifle, boat or house may be confiscated through civil means only yet the effect is far greater than a criminal proceeding which, for example, may result in a $25 fine. The dichotomy likewise sub silentio rejects the applicability of the Constitution to civil matters although this Court has regularly found the Constitution to be applicable. See, for example, Goldberg v. Kelly, 397 U.S. 254 (1970); Fuentes v. Shevin, 407 U.S. 67 (1972); Tinker v. Des Moines School District, 393 U.S. 503 (1969). Finally, even if the presumption language in

LaPlante is given broad effect, it does not compel a result favorable to the tribal position here. Montana establishes that non-Indians purchasing land under the General Allotment Act would not be subject to tribal jurisdiction. Thus, insofar as the lands at issue here were purchased under the authority of that Act, (or in the opinion of the State, contemporaneous act), they certainly should be free from tribal jurisdiction. The "specific . . . federal statute" requirement of LaPlante can thus be satisfied.

In sum, even if LaPlante is given the broadest possible reading, a reading which ignores the language and citations within the opinion, it may not have an effect here.

II

THE UNITED STATES CONSTITUTION DOES NOT ALLOW THE CONGRESS, EITHER ACTING ALONE OR JOINTLY WITH AN INDIAN TRIBE, TO DEPRIVE NON-INDIANS OF THEIR RIGHT TO GOVERN THEMSELVES.

As set forth above, Bates v. Clark, 95 U.S. 204 (1877), definitively established that, as a general rule, Indian country did not extend beyond the boundaries of Indian owned land (or land held in trust for Indians) until 1948. Moreover, Montana v. United States, 450 U.S. 544 (1981), established that Congress did not intend that non-Indians purchasing land under the Allotment Act would be subject to tribal jurisdiction. This would "defy common sense" because Congress clearly intended the reservations to be quickly terminated.

Thus common law and statutory law combined to limit tribal jurisdiction until at least 1948. In that year, of course, Congress enacted 18 U.S.C. § 1151 which extended the term "Indian country" to include fee lands within a reservation. Congress thereby took a positive step to increase the

jurisdiction of the United States in criminal matters over tribal members.[4]

Moreover, Congress, since 1948, and especially since the early 1960's, has taken various actions to strengthen tribal government. Congress has, for example, enacted the Indian Financing Act of 1974, 25 U.S.C. § 1451 et seq. and the Indian Self Determination and Education Assistance Act of 1975, 25 U.S.C. § 450 et seq.

Congressional interest in strengthening tribal governments is also argued to be demonstrated by budgeting for Indian programs.

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[4]The view of the state is that Congress did not intend by passage of 18 U.S.C. § 1151 to impose tribal civil jurisdiction on non-Indians. See supra, pp. 28-29. The inclusion of the fee lands on the reservation within the term "Indian country," however, has allowed tribal government advocates to make the arguments for expansive jurisdiction.

> Total discretionary budget authority requested for special Indian programs Government-wide, including programs in other functions such as income security and education, is expected to be $3.1 billion in 1989. Corresponding outlays are estimated to be $3.4 billion. These amounts do not include payments received by Indians from trust funds established for their benefit or from programs serving all qualified U.S. citizens.

Executive Office of the President, "Budget of the United States Government, Fiscal Year 1989," p. 5-87, 5-88.

What the foregoing pointedly demonstrates is that, at least until 1948, congressional enactments and federal policy prevented tribes from exercising expansive jurisdiction over non-Indians. After that period, especially in the 1960's and beyond, it has been argued that Congress has actively aided and abetted in the expansion of jurisdiction of tribes over non-Indians.

A vital linchpin of this analysis has been the idea that current federal policy informs the judicial inquiry requiring the reach of Indian sovereignty. See, McClanahan v. Arizona State Tax Comm., 411 U.S. 164, 172 (1973). For example, New Mexico v. Mescalero Apache Tribe, 462 U.S. 324 (1983), citing current federal legislation, stated that

> [S]tate jurisdiction is preempted 'if it interferes or is incompatible with federal or tribal interests reflected in federal law; unless. . . .

See also, California v. Cabazon Band of Indians, 480 U.S. ____, 94 L.Ed.2d 244, 259, n.19 (1987); Iowa Mutual Insurance Co. v. LaPlante, 480 U.S. ____, 94 L.Ed.2d 10, 18, n.5. Thus the argument, sub silentio until now, appears to be that while Congress in the pre-1948 period recognized that non-Indians on fee lands on the reservation had a right to govern themselves, the Congress, by enacting 18 U.S.C. § 1151, and by providing a

backdrop of legislation favoring tribal government, can and has deprived non-Indians on reservations of their right to self-government.

The question unanswered by the recent actions of Congress and by the preemption analysis is whether Congress acting alone or in conjunction with an Indian tribe can constitutionally deprive non-Indians of the right to govern themselves, especially on fee lands within the reservation.[5]

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[5]Because the Constitution does not apply to Indian tribes, see Talton v. Mayes, 163 U.S. 376 (1896), a non-Indian subjected to the jurisdiction of a tribe is deprived of his constitutional rights. The Indian Civil Rights Act is not, even in theory, the equivalent of the Constitution. For example, non-Indians may consistently with the ICRA, be excluded from participation in tribal government. Moreover, the federal courts are not available to redress violations of the Act, see Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978) (except for habeas corpus), although such relief was once apparently

(Footnote Continued)

The issue is framed here in the context of whether a state may zone fee lands within a reservation. When a state or county zones, of course, it zones through a popularly elected body. All residents, regardless of race or affiliation, can vote for the members of the body. A regulation that only those with particular blood quantum could vote in a county election would be anathema and struck immediately as inconsistent with the Constitution. All county residents can likewise participate in any initiative, referendum, or recall which might be available under applicable state law. Any person can run for office. This is the

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(Footnote Continued)
thought possible. See Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 212 (1978). As the Statement of Interest above indicates, tribal courts and councils treat the ICRA with disdain and have made it a true dead letter. See, supra, pp. 2-12.

context in which the county at issue has zoned; the right to zone stands before the court as the right to self-government.

In place of zoning by a democratically elected body, however, the tribe seeks to impose zoning by hereditarily formed aggregation, whose membership is determined by the presence of a particular strain of blood. Only those privileged by descent can vote in tribal elections, hold tribal office, sit on tribal juries, or become members of the tribe. The tribe is, simply and directly, the quintessence of an undemocratic regime.

Can the United States deprive non-Indians of their right to govern themselves? The answer is clearly that it cannot.

It is axiomatic that the United States government, including Congress,

> is entirely a creature of the Constitution. Its power and authority have no other source. It can act only in accordance with all the limitations imposed by the Constitution.

Reid v. Covert, 354 U.S. 1, 5-6 (1957) (plurality opinion). For cases indicating approval of Reid v. Covert, see, Northern Pipeline Construction Company v. Marathon Pipeline Company, 458 U.S. 50, 67, n.17 (1982); Examining Board of Engineers v. Flores De Otero, 426 U.S. 572, 600 (1976); Kinsella v. U.S., 361 U.S. 235 (1960).

In Reid, Congress had provided that a military court could try the spouse of a person in the military service for a crime committed overseas; the precise issue was whether the spouse could be tried for murdering her soldier husband. The military courts had tried the two cases and pronounced sentence. The Supreme Court reversed.

> When the Government reaches out to punish a citizen who is abroad, the

> shield which the Bill of Rights and other parts of the Constitution provide should not be stripped away just because he happens to be in another land.

Reid v. Covert, 354 U.S. at 7. The Court also rejected the view that the treaty power could allow Congress to violate the Constitution. According to the Court:

> The obvious and decisive answer to this, of course, is that no agreement with a foreign nation can confer power on Congress, or any other branch of government, which is free from the restraints of the Constitution.

354 U.S. at 16.

Reid is not, of course, an anomaly. The Reid decision was presaged by De Geofroy v. Riggs, 133 U.S. 258, 267 (1889) in which this Court said:

> The treaty power, as expressed in the Constitution, is in terms unlimited except by those restraints which are found in that instrument against the action of the government or of its departments, and those arising from the nature of the government itself and of that of the States. It

> would not be contended that it extends so far as to authorize what the Constitution forbids, or a change in the character of the government or in that of one of the States, or a cession of any portion of the territory of the latter, without its consent.

In Boos v. Berry, ____ U.S. ____, 99 L.Ed.2d 333, 346 (1988), the Court this year quoted Reid, supra in determining that Bill of Rights protections could not be abrogated within the continental United States:

> it is well established that "no agreement with a foreign nation can confer power on the Congress, or on any other branch of Government, which is free from the restraints of the Constitution."

The lesson of Reid, De Geofroy and Boos is simple and straightforward. Congress cannot through its legislation deprive an American citizen of his constitutional rights whether abroad or within the confines of the continental United States.

Yet, that is exactly what may occur here. The right to self-government is the

most basic right and encompasses the entire Bill of Rights. The right to self-government was, of course, an impetus to the very formation of the Union. Indeed the Declaration of Independence itself states:

> We hold these truths to be self-evident, that all men are created equal, that they are endowed by their creator with certain inalienable rights, that among these are life, liberty and the pursuit of happiness.--<u>That to secure these rights, governments are instituted among men, deriving their just powers from the consent of the governed</u>. . .

Declaration of Independence, July 4, 1776.

The Federalist Papers assured the citizenry who were to adopt the Constitution that self-government was the essence of what the federal union was. Federalist No. 39, written by James Madison, states in part:

> We may define a republic to be, or at least may bestow that name on, a government which derives all its powers directly or indirectly from the great body of the people; and is administered by persons holding their offices during pleasure, for

> a limited period, or during good behavior. It is essential to such a government, that it be derived from the great body of the society, not an inconsiderable proportion, or a favored class of it; otherwise a handful of tyrannical nobles, exercising their oppressions by a delegation of their powers, might aspire to the rank of republicans, and claim for their government the honorable title of republic.

Id. at 251 (emphasis added).

This Court likewise has stated that:

> By the Constitution, a republican form of government is guaranteed to every State in the Union, and the distinguishing feature of that form is the right of the people to choose their own officers for governmental administration and pass their own laws in virtue of the legislative power reposed in representative bodies, whose legitimate acts may be said to be those of the people themselves.

Duncan v. McCall, 139 U.S. 449, 461 (1891). See also, Nevada v. Hall, 440 U.S. 410, 426 (1979): "In this nation each sovereign governs only with the consent of the governed."

Until quite recently, it would have been absurd to argue in a court of the United States that a tribe had general civil jurisdiction over a non-Indian. Such jurisdiction had never been recognized and indeed was antithetical to then existing statutory and case law. It is only recently that tribal advocates and some lower courts have taken very aggressive stances with regard to such civil jurisdiction, arguing essentially that recent congressional pronouncements have legitimized the exercise of such authority over non-Indians. Yet enactments of the United States Congress cannot deprive non-Indians of the right to govern themselves.

When a court relies upon congressional actions, including 18 U.S.C. § 1151 and recent enactments intended to generally strengthen tribal government, to discover a new right of the tribes to exercise civil

jurisdiction over non-Indians and by so doing deprives them of self-government, it has ascribed to Congress an intent to act unconstitutionally.[6]

The attempts of the tribes in this case to deprive the local residents of their right to self-government should be rejected.

This analysis does not disturb the proper scope of tribal self-government. This Court's opinions in Oliphant, Wheeler, and Montana point the way. These cases, taken together, stand for the proposition that a

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[6]The same result follows even if the recent legislation is deprived of all of its force, for the very existence of tribes in law is dependent upon their recognition by the federal government. See U.S. Const. Art. I, § 8, cl. 3. Only the sustained recognition by the federal government of the tribes embodied in Volume 25 of the United States Code, and elsewhere, permits the argument that tribes have ousted the non-Indians of their right to self-government.

tribe retains the power of self-government only to the extent necessary to protect internal relations. The tribal advocates have missed the point of the Montana exceptions by declining to read the cases which define their reach.

CONCLUSION

In a recent case the Eighth Circuit Court of Appeals considered whether a tribe has jurisdiction over nonmember Indians in the criminal context. Chief Judge Lay, in determining that the tribe did not have such jurisdiction, stated

> because the Petitioners, like the non-Indian residents of the Devil's Lake Reservation, cannot vote in tribal elections, hold tribal office, sit on tribal juries, become members of the Devil's Lake Sioux Tribe, nor significantly share in tribal disbursements . . . the powers that may be exercised over them are appropriately limited.

Greywater v. Joshua, 846 F.2d 468, 493 (8th Cir. 1988).

Judge Lay's analysis in Greywater, an analysis based firmly upon the decisions of this Court, points the way to a decision here. Tribes retain power over their own members with regard to internal relations of the tribe. The tribe may not, however, go beyond those limits to deprive non-Indians of their own right to self-government, a right for which the Revolution was fought, and a right guaranteed by the United States Constitution.

This is not, then, just a "zoning case" because it squarely raises questions of power and representative government. The State of South Dakota urges this Court to reverse the

Judgments of the Ninth Circuit Court of Appeals.

Respectfully submitted,

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